

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42080

MINNESOTA NORTHERN RAILROAD, INC.
v.
CANADIAN NATIONAL RAILWAY COMPANY

Decided: March 18, 2005

This decision addresses a complaint filed by Minnesota Northern Railroad, Inc. (MNN), against Canadian National Railway Company (CN) alleging that, in the spring of 2001, CN removed interchange facilities at Warroad, MN, thereby preventing MNN from interchanging traffic on its line to CN's line in violation of 49 U.S.C. 10742. Under that provision, MNN seeks a Board order requiring CN to reinstall reasonable and proper interchange facilities at its own expense. For the reasons set forth below, the Board holds MNN's complaint in abeyance and orders the parties to negotiate for the reinstallation of interchange facilities at Warroad pursuant to the requirements of this decision.

BACKGROUND

In 1996, Rail America Transportation Corporation (Rail America) created MNN as a subsidiary to acquire rail lines from The Burlington Northern and Santa Fe Railway Company, now BNSF Railway Company (BNSF), in northwestern Minnesota. That same year, MNN acquired a former BNSF line that connected to a CN line called the Sprague Subdivision at Warroad. In 2000, KBN, Inc., acquired MNN from Rail America.

In 2001, CN notified MNN that it intended to fully remove the switches at Warroad that connected CN's line to MNN's line. CN's line physically connected to MNN's line via CN's side track. The side track connected to CN's main line at two points: a west switch and an east switch. CN proposed removing these two switches, thus cutting off MNN's connection by disconnecting CN's side track from its main line (the connection from MNN's line to the side track was left intact). CN notes in its pleadings that it had already removed parts of the switches in 1995 because they had deteriorated and were no longer safe and that the switches had not been operational since that time. The removal of the remaining components in 2001 was to be performed as part of a CN rail relaying program on the line.

MNN informed CN that it was opposed to the removal. MNN claimed that, although it had never tendered traffic at Warroad, now that it was under new management, it intended to begin doing so in the near future. Despite MNN's opposition, CN proceeded with the removal because allegedly the switches were not functional, and retention of the switches could have led

to significant safety concerns on its main line, which was in operation. Less than a month after the switches were completely removed, MNN shipped a carload of soybeans to the interchange at Warroad and demanded that CN accept the car. Having removed the switches (and thus being unable to receive the car), CN refused. MNN returned with the car and carried it to its final destination via an alternative route, which it currently uses to route its traffic.

Over the next 2 years, the parties negotiated the restoration of the west switch (only one of the two removed switches is necessary to interchange traffic). CN estimates that the cost of replacing the switch would be \$150,000 in 2001 dollars, a figure that MNN does not dispute. CN proposed replacing the switch, but only if MNN agreed to pay half the costs and guarantee that a minimum amount of traffic would be interchanged at Warroad. As part of the proposal, CN would refund one-third of MNN's contribution for every year that MNN meets the minimum (thus, providing MNN a full refund if the minimum is met all 3 years). MNN rejected CN's offer and instead filed a complaint with the Board pursuant to 49 U.S.C. 11701(b).

On July 25, 2003, the Board served a decision establishing a procedural schedule, which was extended in two subsequent decisions served on October 31, 2003, and November 19, 2003. Pursuant to those decisions, MNN filed its opening statement on October 3, 2003, CN filed its reply on November 10, 2003, and MNN filed its rebuttal on December 5, 2003. By letter filed on December 24, 2003, CN requested leave to file a surrebuttal, along with the surrebuttal itself. By letter filed on January 8, 2004, MNN responded that it did not oppose CN's request for leave and responded to the surrebuttal. Because neither party objects to the other's additional pleading, which are both brief in nature, they will be accepted for filing.

POSITIONS OF PARTIES

MNN claims that, under 49 U.S.C. 10742, and agency precedent, CN is responsible for paying the full cost of replacing the switch. Section 10742 states that carriers shall provide reasonable facilities for interchange. MNN asserts that common carrier service obligations, which include providing interchange facilities under 49 U.S.C. 10742, are not extinguished on a de facto basis just because of non-use.¹ Similarly, MNN submits that, under 49 U.S.C. 10742, parties must continue to provide facilities for interchange to ensure that service to shippers continues.² Thus, MNN argues, once an interchange between two railroads is established, the receiving carrier is under a continuing duty to provide facilities for interchange, and that this

¹ See The Phillips Co.—Petition for Declaratory Order, Finance Docket No. 32518 (ICC served Apr. 18, 1995) (holding no abandonment of a line just because the line has not been used), aff'd sub nom. The Phillips Co. v. Southern Pacific R. Corp., 902 F. Supp. 1310 (D. Colo. 1995), 97 F.3d 1375 (10th Cir. 1996).

² See Norfolk Southern—Petition for Declaratory Order—Interchange with Reading Blue Mtn. & Northern R.R., STB Docket No. 42078, slip op. at 7 (STB served Apr. 29, 2003).

duty does not cease, even if the interchange is no longer used. Therefore, according to MNN, if an interchange at one time existed at Warroad, CN is obligated to continue providing interchange facilities.

MNN concedes that it has never entered into a formal interchange agreement with CN to switch traffic at Warroad and has never switched traffic there. However, MNN alleges that because traffic at one time was switched at Warroad between CN and Burlington Northern Railroad Company, BNSF's predecessor, CN was under a duty to provide interchange facilities, and is still responsible for maintaining the switch, even if no traffic had been switched there for years.

MNN also argues that CN has held itself out for interchange service at Warroad, thus demonstrating CN's belief that an interchange at Warroad still exists. MNN bases this argument on the fact that the Warroad interchange was listed for CN in various railroad publications, including the Official Open and Prepay Station List, the Official Railway Equipment Register, and in the Official Railway Guide. MNN also notes that CN contacted MNN to inquire about MNN's rates for interchanging traffic at Warroad.

MNN claims that the interchange with CN at Warroad is necessary because it currently routes its traffic along a more circuitous route. If the Warroad interchange was in place, MNN asserts that it could move virtually all of its traffic, perhaps as much as 1,400 carloads per year, along a shorter route.

In its reply, CN argues that, because both parties will benefit from the reinstallation of the switch, MNN should contribute to the cost as well, or at least guarantee traffic so that CN is not bearing all the risk. CN fears that, if it replaces the switch but does not receive any traffic, it will have unnecessarily spent \$150,000 and will be unable to recoup the cost.

In response to MNN's claim that there is an existing interchange at Warroad, CN counters that the interchange at Warroad has not been operational since before MNN's ownership of its line. Although CN admits that at one time traffic was interchanged at Warroad, it claims that this has not been done for many years – at least since 1995, when CN first removed components of the switches. CN argues that, because there is no existing interchange at Warroad, MNN is actually demanding a new interchange. Under 49 U.S.C. 11103(a), CN argues that it is entitled to require that a new interchange “furnish sufficient business to justify its construction and maintenance.”³

CN also disputes MNN's claim that CN held itself out for interchange at Warroad. CN argues that the listing of the interchange in various railroad publications is misleading. These

³ See also Missouri Pac. R. Co. v. Louisiana & A. Ry. Co., 332 I.C.C. 569, 581 (1968).

listings state that the interchange at Warroad is between CN and BNSF's predecessor, not CN and MNN. Furthermore, CN argues that these listings are obsolete, especially because clerical revisions in these publications are often not timely made, as is evidenced by the fact that BNSF's predecessor is listed at other interchange points where BNSF's lines have been sold to MNN. CN also acknowledges that it contacted MNN to inquire about interchange at Warroad, but only to determine MNN's rates in the event that the interchange was established.

CN suggests that MNN may want the interchange at Warroad only to put competitive pressure on BNSF and Canadian Pacific Railway Company (CP), with whom MNN currently interchanges traffic at other locations. The threat of interchanging traffic at Warroad, CN argues, may cause BNSF and CP to lower their interchange rates, thus obviating MNN's need to actually interchange at Warroad. CN also notes that MNN has tried to obtain guarantees on the number of carloads it will receive from its shippers, but that the shippers have not provided such guarantees, suggesting that the amount of traffic may not be as high as MNN predicts.

DISCUSSION AND CONCLUSIONS

The facts of this case are unique and it appears that neither the Board nor our predecessor, the Interstate Commerce Commission, have ever addressed an interchange dispute such as this one. In fact, interchange disputes are rarely brought before us. Interchange arrangements are not matters that require, nor are furthered by, regulation, but are better handled through private negotiations and agreements. Nonetheless, because the parties have been unsuccessful in their attempt to reach an agreement over who should bear the financial responsibility of replacing the switch at Warroad, and MNN has sought relief here, we will provide guidance to help the parties resolve their dispute.

The parties' dispute centers around a disagreement as to which statutory provision applies in this case. MNN argues that the connection at Warroad is an existing interchange because traffic was switched there at one time and because CN held itself out for interchange and, as a result, CN's obligation to maintain interchange facilities under 49 U.S.C. 10742 never ceased. Conversely, CN argues that, although traffic was interchanged at Warroad at one time, the interchange no longer exists and the reinstallation of a switch at this point will constitute a new interchange, which under 49 U.S.C. 11103(a), requires sufficient business to justify the interchange.

Contrary to CN's claim, we find that 49 U.S.C. 11103(a) is not applicable to this case. Section 11103(a) provides that:

[o]n application of the owner of a lateral branch line of railroad . . . a rail carrier providing transportation subject to the jurisdiction of the Board . . . shall construct, maintain, and operate, on reasonable conditions, a switch connection to connect that branch line or private side track with its railroad . . . when the

connection—(1) is reasonably practicable; (2) can be made safely; and (3) will furnish sufficient business to justify its construction and maintenance.

This statutory provision historically has been applied only to situations involving shipper-owned track.⁴ Specifically, a lateral branch line has been defined as a line that is tributary to and dependent on another line for an outlet, not an independent and competing line. See Baltimore & Ohio S.W.R.R. v. U.S., 195 F. 962, 967 (1912). MNN’s line here is not shipper-owned; rather, it is an independent and competing line of railroad. Thus, 49 U.S.C. 11103(a) is inapplicable.

MNN, on the other hand, bases its argument on 49 U.S.C. 10742. This statutory provision states that a “. . . rail carrier . . . shall provide reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic between, and for the receiving, forwarding, and delivering of . . . property to and from, its respective line and a connecting line of another rail carrier . . .” MNN is correct that a railroad’s common carrier duties, including those under this statutory provision, are not extinguished simply because of non-use. Thus, under certain circumstances, we might find that a carrier could be required to reinstall a switch that it has removed.

We find, however, that MNN is interpreting the scope of 49 U.S.C. 10742 beyond its intended purpose.⁵ Section 10742 states that a carrier shall provide “reasonable, proper, and equal facilities” for interchange. We are unconvinced that requiring, as MNN urges, CN to pay the full cost of restoring this switch without a guarantee that it will receive any traffic can be considered reasonable. While under normal circumstances CN would need to replace the interchange switch it removed, in this particular circumstance we find that it would be unfair to force CN to pay the full cost of restoring the switch when MNN has not provided any assurances that it will ship traffic through Warroad, and the record casts doubt on whether MNN ever intends to do so. If after replacing the switch, MNN decides not to ship its traffic along this route, CN would have spent \$150,000 with no benefit to itself or the shipping public, and no chance of recovering its costs.

⁴ See Battaglia Distributing Co., Inc. v. Burlington Northern Railroad Co., Finance Docket No. 32058, slip op. at 4 (STB served June 27, 1997) (“[a] lateral branch line, by definition, is a private line . . .”).

⁵ Central Power & Light Co. v. Southern Pacific Transp. Co., et al., 2 S.T.B. 235, 243 n.10 (1997) (“[h]istorically, interchange cases under section 10742 . . . have mainly concerned discrimination issues between carriers; i.e., whether, under section 10742, a rail carrier has failed to provide a complaining rail carrier with interchange facilities ‘equal’ to those offered to other railroads.”).

We note that an interchange is a mutual arrangement that will benefit two carriers, not just one. In this case, MNN seeks to benefit from the interchange without paying a share of the reinstallation cost or assuring that it will provide any traffic at all. As it is both parties that are intended to benefit from use of an interchange, the more reasonable solution in this case is that both parties contribute to reinstalling the interchange.

We are unpersuaded by MNN's argument that CN held itself out as providing an interchange at Warroad and, thus, that there may have been an implicit interchange arrangement. None of MNN's evidence conclusively shows that CN in fact held itself out for interchange at Warroad. Although there may have been some listings in various railroad publications, CN is correct that these listings are not always updated promptly. MNN also claims that CN intended an interchange at Warroad because it failed to update the Official Railway Guide listing upon receipt of MNN's Junction Interchange Update Form. However, CN removed parts of the switches as early as 1995 and made no attempt to restore them, acts which indicate it in fact had no intention of interchanging traffic. CN's inquiry to MNN about its rates also seems reasonable in light of the fact that the two parties were negotiating for the restoration of the switch at Warroad.

Accordingly, we find that MNN must bear some responsibility for reinstallation of the switch at Warroad if it still wishes to interchange traffic there. However, because we prefer that the parties to an interchange arrangement resolve these issues themselves, we shall not prescribe a specific course of action for how CN and MNN must fulfill their responsibilities. MNN may choose to guarantee that a certain amount of traffic will be interchanged (thus allowing CN to recoup its costs), pay an equal portion of the cost of reinstalling the switch, or contribute in some other manner that has not been proposed here. Therefore, we will hold MNN's complaint in abeyance and order the parties to negotiate a reasonable arrangement for the reinstitution of interchange at Warroad pursuant to the requirements of this decision. In the event that the parties are unable to reach an agreement, we will proceed to address the complaint and the parties may at that time seek a prescription from us.

Carriers that currently operate and maintain interchanges should note that we will not tolerate the removal of interchange facilities for anticompetitive or other unjustified purposes. See, e.g., Ohio Valley Railroad Company—Petition to Restore Switch Connection and Other Relief, STB Finance Docket No. 34608 (STB served Feb. 23, 2005) (finding that the removal of switches by Indiana Southwestern Railway Company was unjustified and would detract from another carrier's ability to provide service and was therefore improper). Here, however, CN's decision to remove the switches was apparently based on the fact that they had deteriorated and were no longer safe, and on the belief that the interchange would no longer be used. There is no indication that the removal was motivated by an anticompetitive intent.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. MNN's complaint is held in abeyance.
2. MNN and CN are ordered to negotiate a reasonable arrangement for the reinstitution of interchange at Warroad, MN, pursuant to the requirements this decision, and to notify the Board when they have done so. If agreement cannot be reached, the parties shall so notify the Board and we will address the complaint.
3. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary